

Report on the 2015 ECSL Practitioners' Forum

The 2015 ECSL Practitioners' Forum was organised on 27 March 2015 at ESA Headquarters in Paris. The organisation was taken care of by ECSL Executive Secretary **Mr. E. Boulle**, in close cooperation with the ECSL Chairman, **Prof. Dr. S. Marchisio**, of the University of Rome 'La Sapienza', and the Coordinator of the Practitioners' Forum, **Prof. Dr. F.G. von der Dunk**, of the University of Nebraska-Lincoln. The Forum was attended by some 90 participants, most of which remained in attendance until the very end in spite of the fine spring weather outside in Paris.

Prof. Marchisio briefly welcomed the participants, introduced ECSL and the Practitioners' Forum. His introductory words were followed by another welcome by **Dr. M. Ferrazzani**, ESA Legal Counsel and Head of the Legal Services Department at the Agency, hosting the event once more in the grand ESA Council conference room.

Prof. Von der Dunk then introduced the topic of the Forum, 'Space Governance in Europe; Regulation of Space Activities', whilst defining 'governance' as a 'the exercise of authority and control by way of a method or system of government or management' which – certainly in Europe – comprised more than only governmental control and crucially involved two major intergovernmental entities: the European Space Agency and the European Union.

The morning session was to generally move from the more abstract, overarching policy and legal developments to the more practical, 'down-to-earth' applications of exercising control and authority over space activities in Europe. The first speaker, **Mr. N. Peter**, working within the European Commission's Directorate-General GROWTH, addressed the Commission's exploratory work on the follow-up of the space industrial policy and in particular the existing national space regulatory framework. Mr Peter pointed out that as a result of five broad overarching studies on the issues, including in particular a space law study, the conclusion had been drawn that traditional space law issues do not present regulatory obstacles to the evolution of private space activities in Europe than the lack of a comprehensive and coherent set of national space laws is not hindering the intra- and extra-European industrial competitiveness.

The second speaker was **Mr. J. Bruston**, Senior Administrator in the European Union Relations Office at ESA, who addressed the ESA perspective on the ongoing and increasing collaboration with the European Union in matters of space activities and policies. Notably, he outlined how since the Framework Agreement of 2004, still the major ruling legal document on ESA-EU relations, the Galileo and Copernicus flagship projects had been developed, with the European Union as the driving financing and leading institution and ESA mainly being mandated by the Union to execute these programmes and supervise the procurement to be undertaken in that context. In spite of the shared competence which the Union since the Lisbon Treaty is allowed to exercise in matters of space policy and programmes, in many instances the dividing line between the respective roles and responsibilities of the two organizations is not clear and would require further refinement and precision.

Following the coffee break, **Mr. P. Reynaud**, working at the ESA Legal Services Department, addressed the specific tool of delegation agreements from the Union to the

Agency. He explained that by the end of 2015 there will be eight agreements between ESA and the Union on Galileo and Copernicus taken together. Further to the GNSS Regulation (No. 1285/2013), he clarified that three delegation decisions had to be taken: for Galileo deployment (with ESA), for EGNOS (with the GSA, plus a subsidiary GSA-ESA working arrangement), and for Galileo exploitation (with the GSA, plus a subsidiary GSA-ESA working arrangement). Most important in this context was the distribution of ownerships and risks, noting for example that ESA qualified as a launching 'state' under Liability Convention when it comes to launching space objects as part of the Galileo or Copernicus programmes, whereas the Union, despite being in the driver's seat here, was not subject to such liabilities.

Then, **Mr. B. Cheynel**, *Référéndaire* to Judge Šváby at the Court of Justice of the European Union, addressed the Court's perspective on the European space governance issue. He discussed at length the only two cases so far before the CJEU involving ESA, both instigated by Galileo International Technology, but neither of them directly addressing matters of space law or space governance. There had been no cases instigated against any of the space-related EU Decisions either, wherefore he considered his remarks to be necessarily prospective in nature. Thus, he proceeded to address various, so far theoretical, options for the CJEU to review non-EU activities, for example in the realm of space activities and programmes such as conducted under the guidance of, or with a mandate given to, ESA, for instance under the competition regime prohibiting the abuse of a dominant position or of state aid.

Immediately after the lunch break, a special session of the programme was dedicated to the presentation of the Inaugural ECSL Essay Competition Award by **Prof. Dr. S. Hobe**, Director of the Institute of Air and Space Law of the University of Cologne. The question chosen for the first year of the competition was 'What are the main legal issues raised by space mining?'; in the end nine essays were submitted. The winner was Mr. Lucius Klobucnik, University of Helsinki, Finland; 1st runner-up Mr. Kamil Dobrowolski, Jagiellonian University, Krakow, Poland; and 2nd runner-up Mr. Thomas Cheyney, Open University, United Kingdom.

Following that intermezzo, the afternoon session focused on various practical implementation issues. First, **Dr. O. Heinrich**, Partner at BHO Legal, spoke on lessons and best practices in procurement. With the general discussion so far largely – as far as Galileo was concerned – focusing on the Commission and the GSA, he addressed the roles of member states and the Agency as contracting authorities, where member state public procurement law has now been made subject to EU harmonization as per the relevant EU Directives – which were, however, not developed specifically for the space sector: they would not take fully into account the high technological complexity, the existence of many one-off projects with long lead-times, the high financial commitments and risks, and the many safety- and security-related framework requirements, including those pertaining to export control issues.

Second, **Mr. J.J. Tortora**, Director of ASD-Eurospace, spoke on how the manufacturing industry perceives the issue of European space governance. He started off by saying that basically the sector was happy to rely on the wisdom of European institutions to provide an appropriate legal and policy framework. Manufacturers mainly focus on their

customers, and want customers who know what they want; the role they expect from the European institutions would be quite simply to develop the necessary clear frameworks, avoid unnecessary duplications, and avoid expensive institutional obstruction. Speaker's main point of concern was that whilst the global approach to space is changing from a technology-driven endeavour to an applications- and commerce-driven one, in Europe the same institutional 'tools' are still being used. ESA is very close to the users only in the science realm, whereas elsewhere it is essentially operating somewhat at arms' length.

Third, **Mrs. C. Ameil**, Coordinator of the EMEA Satellite Operators Association (ESOA) Regulatory Working Group, addressed the perception of European space governance issues with the satellite operators community. Further to the previous speaker, Mrs. Ameil by contrast was not so much ready to *rely* on the wisdom of European authorities, but rather to prod them onwards in the right direction – namely of responsible international/regional regulation. From the Association's perspective in particular a sustainable environment requires responsible behaviour and responsible regulation. Whereas the satellite industry contributes by carrying space situational awareness sensors, such a sustainable environment requires consistency between national and regional regulators. The ITU was perceived to do that rather well; but also the WTO would have to be mentioned here.

Following the tea break, a general and lively panel discussion evolved, under the Chairmanship of **Dr. Ferrazzani**. **Mr. A. Smith**, General Counsel with the Safran Group, **Prof. Dr. J. Wouters**, University of Leuven, and **Mr. Peter** amongst themselves as well as with the audience discussed such things as, amongst others, the joint venture of Airbus and Safran on European launch service provision as one example of how also in Europe the pace of commercialization is increasing, the recent Commission Communication on EU-ESA relations, and the work done by the Commission to maintain space industrial competitiveness.

Prof. Von der Dunk then offered some concluding remarks. He noticed a somewhat worrisome divergence between the legal situation and framework in Europe and the political/practical realities, with the former increasingly lagging behind the latter. This pertained to such issues as the lack of harmonization of existing national space law within the Union and absence of such law in even more member states, increasingly problematic in view of the challenges posed by nano-satellites, and 'interference' in a legal sense from tax law and frequency regulation, perhaps necessitating some level of Commission action even if not of a legal – read harmonizing – nature. The inter-organizational ('sincere') cooperation between ESA and the Union in reality turned out to become more a matter of a contractual relationship, whilst liabilities of the former as procuring/contracting authorities were not necessarily in line with the actual accountabilities of the latter. In this context in particular the absence of the Union as a 'party' to the space treaties was noted; and it was suggested that maybe the time had now come for the Union to deposit the required declarations. Another suggestion would be to revise the Framework Agreement, and bring it more up to date with present-day realities; so far, its *à la carte*-approach has resulted in diverging approaches to Galileo, Copernicus and other areas without the requisite focus on the changing paradigm of commercialization.

Prof. Von der Dunk finally thanked ESA for hosting once again the Practitioners' Forum, the chairmen and speakers for their many excellent contributions, the other participants for their active engagement in the discussion, and last but not least **Mr. Boule** for his excellent organization of the Forum.

Frans G. von der Dunk